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New Jersey Appellate Division Holds That There Is No Bright Line Rule Prohibiting The Enforcement Of An Indemnification Provision When The Indemnitee Is Alleged Or Has Been Shown To Be Negligent

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On January 16, 2013, in a published decision, the New Jersey Appellate Division decided Sayles v. G&G Hotels, Inc., ____ N.J. Super. ____ (App. Div. 2013), A-2926-11T1, in which it addressed the sufficiency of an indemnification provision for claims arising out of the indemnitee's negligence.

The Appellate Division determined that the indemnification language of the contract between the parties was unequivocal and that there was no bright line rule prohibiting the enforcement of an indemnification provision when the indemnitee is alleged or shown to be negligent.

In Sayles, defendant G&G Hotels, Inc. ("G&G"), a hotel operator, and defendant Howard Johnson International, Inc. ("HJI"), entered into a license agreement which permitted G&G to use the Howard Johnson name. Nicholas Sayles and Daniel O'Neill fell through a third-floor window of G&G's Atlantic City hotel, killing Sayles and serious injuring O'Neill. The license agreement contained the following indemnification provision, which required G&G to:

indemnify, defend and hold [HJI] harmless, to the full extent permitted by law, from and against all Losses and Expenses, incurred by [HJI] in connection with any…claim…relating to or arising out of any transaction, occurrence or service at or in conjunction with the operation of the Facility, any breach or violation of any contract or any law, regulation or ruling by, or any act, error or omission (active or passive) of, [G&G], any party associated or affiliated with [G&G], or any of their respective owners, officers, directors, employees, agents or contractors, including when the active or passive negligence of [HJI] is alleged or proven.

[Emphasis added.]

HJI sought summary judgment on the indemnification provision and the trial judge granted HJI's

motion. G&G appealed, claiming that the trial judge erred as the provision allowed for at least two plausible interpretations and therefore was ambiguous and equivocal. In particular, G&G claims that the provision's end phrase only concerns that portion of the provision immediately preceding it.

G&G argued that Ramos v. Browning Ferris Industries of South Jersey, Inc., 103 N.J. 177 (1986), Mantilla v. N.C. Mall Associates, 167 N.J. 262 (2001), and Azurak v. Corporate Property Investors, 175 N.J. 110 (2003), created a bright line rule that prohibits enforcement of an indemnification provision where the indemnitee is alleged to have been negligent. The Appellate Division found that in none of those cases did "the indemnification provision mention whether indemnification would be required when the indemnitee was alleged or shown to be negligent." The Appellate Division further found that the license agreement indemnification provision at issue expressly includes losses "where it is 'alleged or proven' as having been caused by the negligence of HJI." G&G's arguments were not based on the absence of a reference to an indemnitee's own negligence, as was the case in Ramos, Mantilla and Azurak, but on G&G's claim that the placement of the phrase made it ambiguous.

The Appellate Division found that G&G's reading of the provision was "crabbed" and that it mixed apples and oranges. Although agreeing that the indemnification provision could have been better written, the Appellate Division found that indemnity provision was not equivocal or ambiguous.

This decision highlights the importance of parties clearly expressing their intent regarding indemnification and the need for insurers to closely review and analyze indemnification provisions in determining coverage. It appears that using the word "including" instead of "regardless" when referring to the indemnitee's negligence may be a critical distinction making the parties' intent clearer as to whether the indemnitee is entitled to indemnification for its own negligence. See, e.g., Englert v. The Home Depot, 389 N.J. Super. 44, 56 (App. Div. 2006), certif. denied, 192 N.J. 71 (2007).

Should you have any questions or comments, please feel free to contact James P. Lisovicz or Vincent E. Reilly.